

JANUARY 31, 1771.

Unto the Right Honourable the Lords of Council and Session,

THE PETITION

RODERICK MACKENZIE of Scotsburn, Esquire,

Humbly sheweth,

THAT the commissioners of supply for the county of Ross having met upon the 30th of April last, in order to choose a collector, the names were called over from an old nomination, passed in the second year of his present Majesty's reign. In this nomination, Mr. Urquhart of Kinbeachy is, by mistake, called *James*, whereas his real name is *Thomas*. When the roll was called, no person made any objection to Mr. Urquhart, on account of the misnomer, and his vote was received without challenge, in the election of preses and clerk to the meeting. The commissioners went on with their ordinary business, of settling accounts with the collector for the last year's cess; and, in this also, Mr. Urquhart acted in the same manner with any other commissioner present.

The next business of the meeting was, to elect a collector for the present year. For this office there were two candidates, Mr. Kenneth Mackenzie, tutor of Kilcory, and the petitioner, Mr. Mackenzie of Scotsburn. There were present thirty-seven commissioners; of these eighteen, including Mr. Harry Munro, the preses, voted for Mr. Kenneth Mackenzie; the remaining nineteen, including

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where

cluding Mr. Urquhart, voted for the petitioner. No challenge was made to Mr. Urquhart, until after all the votes were taken, and until Mr. Kenneth's party found that they were the minority. Then, indeed, Mr. Mackenzie of Highfield protested against Mr. Urquhart's vote, on account of the misnomer. The preses, upon this (without putting the question to the meeting) took it upon him to give it as his opinion, that Mr. Urquhart's vote was not a legal vote; and, as this would reduce the number to an equality, he gave his casting-voice in favour of Mr. Kenneth Mackenzie.

This produced a good deal of altercation; and, at last, it was agreed, that the matter should be determined by a reference to arbiters; and, accordingly, the two candidates, Mr. Kenneth and the petitioner, at the sight of the commissioners, signed a letter of submission, whereby they referred the merits of the election to Mr. Ross of Inverchasley, and Mr. Mackenzie of Belmadubhy; and, in order to give the arbiters time to determine the matter, the commissioners adjourned their meeting to the first of June thereafter, and, in the mean time, authorised their clerk to act as interim collector.

In a few days after this first meeting, it was discovered that there had been a new nomination of commissioners in the year 1769, in which the misnomer of Mr. Urquhart is corrected. The petitioner, being satisfied that this made the merits of the election perfectly clear in his favours, and that the arbiters would find so accordingly, he was at no pains to bring any of his friends to the meeting on the first of June, as he rested satisfied, that the commissioners would do nothing in contradiction to the submission, and to the proceedings at the former meeting, which no longer could be the subject of dispute, the petitioner having been elected by a clear majority.

It appears, however, that the friends of Mr. Kenneth Mackenzie had resolved upon different measures; for a party of them having been privately formed to meet upon the first of June, did accordingly meet, and it was proposed by one of his friends, that a commission should be made out in his favour; to this it was objected by a commissioner then present, "that it evidently appears from the minute of the 30th of April, where the votes of thirty-seven gentlemen were taken, that seventeen, besides the

preses

"preses of the meeting, voted for Mr. Kenneth Mackenzie, as
 "collector, the remaining nineteen, which constituted a clear
 "majority, voted for Mr. Mackenzie of Scotsburn; that as an
 "objection was made to the vote of Mr. Urquhart of Kinbeachy,
 "on account of a misnomer in the act of the second of the King,
 "which was the act from which the commissioners' names were
 "that day called, the merits of the election were, upon that day,
 "in presence, and by the approbation, of all the commissioners,
 "referred to arbiters; and besides, as it now appears by an act of
 "the ninth of the King, this day produced, that the misnomer,
 "with respect to Mr. Urquhart of Kinbeachy, had been rectified,
 "and that he, at that time (supposing a misnomer were a legal
 "disqualification) had a title in his person, and that the clerk,
 "by omitting to produce the proper nomination, could not alter
 "an act of the legislature; therefore, it is protested, that the pre-
 "sent meeting do either grant commission to Mr. Mackenzie of
 "Scotsburn, the gentleman who had the majority, or that they
 "do allow the arbitration to take effect.

The question, however, was put, and the meeting, by a major-
 "ity of voices, ordained and appointed a commission to be made
 "out in favour of Kenneth Mackenzie, tutor of Kilcoy, for levying
 "and in-gathering the supply due to his Majesty from the county,
 "for the current year, and a commission was accordingly made out,
 "and signed by the preses, in name, and by appointment, of the
 "meeting, Thomas Mackenzie of Highfield having become caution-
 "ner for the said Kenneth Mackenzie.

The petitioner was advised that this proceeding was equally
 "irregular as unjust; irregular, in so far as they presumed in that
 "summary manner, and during the dependance of an arbitration,
 "on which the parties relied, to give any judgment at all in the mat-
 "ter; and unjust, in so far as they gave judgment in favour of the
 "person, against whom the real merits of the election clearly lay.
 "The arbiters refused afterwards to determine, and the present
 "action was brought, concluding to have it found and declared,
 "that the foresaid proceeding of the first day of June, ought to be
 "reduced and set aside, and that it should be found and declared,
 "that the petitioner was duly elected into the office of collector of
 "supply of the county aforesaid, for this current year, and that he
 "is intitled to hold the said office, and to receive the salary and
 "emoluments

emoluments thereof, and that Kenneth Mackenzie ought and should be prohibited and discharged from executing the said office, or from drawing any part of the salary, or emoluments thereof, or if he has already received any part of them, he should be decreed and ordained to pay the same to the petitioner.

The defenders called in this action are, Kenneth Mackenzie, the competing collector, and the nine commissioners, who concurred in the most irregular proceeding upon the first of June, and Colin Mackenzie, writer in Dingwall, their clerk, all of whom were called as defenders, in the view of the petitioner's being indemnified at their hands, of the expence incurred by him, in consequence of their improper procedure.

The action having come before the Lord Monboddo, ordinary, the defenders having taken up a conceit, that their cause would be greatly aided, provided they could procrastinate their defence, during the period of the current year, when the office of collector expired, did not think proper to appear, whereupon the pursuer satisfied the production, by producing the extract of the minutes of the commissioners of supply, called for, and craved that great avifandum might be made therewith, which, accordingly, of this date, was done by the Lord ordinary.

Dec. 6th
1770.

Against this interlocutor, upon the last of the reclaiming days, a representation was offered, insisting that action could not proceed till the whole commissioners of supply were made parties to it; and the Lord ordinary ordained this representation to be answered at the bar.

December 19.

Parties were heard, and the defenders insisted upon their dilatory defence; for that the whole commissioners of supply had a patrimonial interest, as being ultimately liable to the crown for the whole cess of the county; and therefore ought to have been called; or, at least, the commissioners, who were present upon the 30th of April, and who had the only power of naming a collector, and who did elect accordingly; whereas the pursuer had only called the commissioners present at the meeting of the 1st of June.

It was answered for the petitioner, that the only reason of calling the commissioners on the 30th of April, was to bring them in for expences on account of their irregular proceedings, and that, by the same rule, the defenders did insist upon calling the commissioners.

commissioners of supply, they might insist for calling all the whole heritors in the county, who were ultimately liable in the payment of the fees; and therefore it was not necessary to call any other than the person competing for the office, as was the method in other cases, although third parties might have an indirect interest; such as the case of competing deacons for different incorporations, where the court has not found it necessary to call the individual members of the incorporation; a recent instance of which occurred in the case of Kinghorn, where your Lordships expressed some degree of disapprobation at the individual members being called, and still allowed them to be examined as witnesses for the real defenders, though themselves were nominal parties. It was replied, that if expences were awarded against judges for giving their opinion, it would be beyond measure hard, and that the commissioners of supply are no more than judges cognoscing the merits of the election of a collector, is evident. That as the commissioners are by law accountable for their collector, and, if he fails in his circumstances, are liable for his failings, so far as he has intromitted with the publick money; therefore they have a patrimonial interest, and should be made parties to the process, at least such of them as were present at the election of the 30th of April last.

Upon this debate the Lord ordinary "sustains the defence, that the whole of the commissioners of supply, who voted for and elected the defender, Kenneth Mackenzie of Kilcoy, upon the 30th of April last, were not called as parties to this process; therefore dismisses the process, and decerns, reserving to the pursuer to apply by petition to the court, if he shall see cause, without giving in any representation to the Lord ordinary."

Of this interlocutor the petitioner humbly craves a review. He is not surpris'd that the defenders should have recourse to every dilatory defence; for, supposing the nomination 1766 was the only rule of determining this question, the petitioner is advis'd that Mr. Urquhart of Kinbeachy's vote was a good one, and ought to have been sustained, notwithstanding the misnomer. That gentleman had acted as a commissioner for many years past, without any objection; and even at the very meeting upon the 30th April last, he was allowed to vote in the choice of preses and clerk, and in every other business, until, upon num-

being votes, it was found necessary to do something to lay the foundation for the preses claiming a casting vote, and the expedient of repelling Mr. Urquhart's vote was improperly resorted to.

There is scarce one of these nominations which do not contain many errors in the names and designations of the persons appointed; but it is enough, *si constat de persona*. The intention of these supply acts, and the nominations contained in them, is to invest the principal gentlemen of each county with the office and trust of levying the publick land-tax, and of performing the other duties therein required; and it would be absurd to go so strictly to work, as to reject a gentleman, otherwise qualified, merely because his name happens to be mis-spelled, or because he is called *James* in place of *Thomas*, when he is sufficiently denoted by his surname and designation. If there had been two Urquharts of Kinbeachie, or, if the present Kinbeachie had only succeeded since the 1766, to a former laird of the name of James, there might have been room for the quibble; but, as matters are circumstanced with regard to that gentleman, the objection is, with submission, highly captious.

And what seems to put the matter beyond a doubt is, that the error in his name is corrected by the last nomination in the 1769. It is of no importance, that the clerk was not possessed of a copy of this nomination, and that the names were read from the old one, because the new one was not at hand, or purposely kept up. It was nevertheless a good nomination, under which every person contained in it, and legally qualified, was intitled to act and vote. The clerk, by omitting to produce the proper nomination, could not alter an act of the legislature; Mr. Urquhart had the title in him; he had as good a right to vote as any man present, and he accordingly gave his vote in favour of the petitioner.

The proceedings upon the first June were singularly irregular, for the commissioners then present ought never to have taken upon them to canvass the merits of the election upon the 30th of April, so long as the matter was in the hands of the arbitrators; and even although there had been no arbitration, the petitioner is advised, and does contend, that any subsequent proceeding to an election was improper and incompetent, for the 30th of April was the day appointed by parliament for the choice of a collector; and the commissioners present, to the number of thirty-seven, having
given

given their voices, they were *functi*, as to that piece of their duty, and the merits of the election thenceforth resolved into a matter of private right betwixt the two competitors, to be discussed by them in the regular course of law.

This last observation naturally leads the petitioner more particularly to consider the judgment of the Lord ordinary, now brought under review. The ground of that judgment the petitioner apprehends to be this, that the Lord ordinary considered the commissioners, electors of Mr. Kenneth Mackenzie, as cautioners for him, and therefore having a patrimonial interest in the matter, ought to have been made parties in the cause, a proposition which in no part of it the petitioner can admit. For,

In the first place, if it is at all well founded, the petitioner is at a loss to conceive the grounds why the necessity of calling the commissioners, is restricted to those only who voted for Mr. Kenneth Mackenzie. It may be true, that the commissioners differed in their votes who should be collector; but the petitioner is advised, that that can make no difference, upon the consequence of the idea, which the Lord ordinary has adopted; for the moment a collector is chosen, the individual commissioners are *functi* as to their particular votes; he becomes the collector of the whole county, and, if any of them are liable in consequences, all of them would be equally so, in the same manner as in any other proceedings of the commissioners, where the act of the majority must be considered as the act of the whole. But,

Secondly, The petitioner does, with submission, dispute, that the commissioners of supply, either in whole or in part, are to be considered as cautioners for the collector whom they appoint. The law says, *they are to appoint collectors, with such caution as they shall think fit*; and if the commissioners do proceed *bona fide*, in the execution of their duty, appointing collectors in all appearance proper, and exacting due caution from them, for the regular performance of their office, the petitioner can never conceive it to be the idea of the law, that they, in the *bona fide* execution of a gratuitous office, should be liable for losses arising from the failure of the collector, or his cautioners, or other unforeseen accidents, which human foresight could not investigate. They are, no doubt, so far *answerable* for their collectors, that if they should make choice of a collector apparently improper for the office, or should be guilty of any other
piece

piece of gross or culpable negligence, in the execution of their duty, there would be grounds, at common law, why a claim would be competent to the county, to be relieved from any loss thence arising; but, when no such blame lies at their door, it does not occur where are the grounds, either in law or justice, why the commissioners, nominated by the legislature for the discharge of this gratuitous office, are to be subjected to the losses arising from the failure of a collector, duly appointed by them, more than any other persons in the county liable in the payment of cess.

3tio. If this idea of a cautionary obligation is sufficient to support the Lord ordinary's interlocutor, it is difficult to perceive how far it will not go. The commissioners of supply are, at any rate, not the immediate cautioners of the collector. The cautioner appointed by them, must, in the first place, be liable; and they can only be considered as attestors to that cautioner. Now, the petitioner would ask, why the attestors of the commissioners are not to be called, viz. the whole heritors of the county, for the cess must undoubtedly be paid, and, failing all those who are primarily liable, the county itself is subject to be quartered upon: So that if all persons, however remotely interested in the due execution of the office of the collector, are necessary to be made parties, in a question, who is legally chosen collector, the roll of defenders must, indeed, become exceedingly numerous, and questions of that nature, which must naturally occur, will become altogether inextricable.

Lastly, The idea of the Lord ordinary is, with submission, at any rate, misapplied to the present question before your Lordships. If the commissioners were in a debate, whether the one or the other party had made choice of an improper or unqualified person to be a collector, the commissioners themselves might, perhaps, be the proper parties, in order to have such a question fully and regularly canvassed; but, in the present case, when there is no question as to the propriety or qualification of either of the competing candidates; where the commissioners have already given their voices as their favour and inclination directed; when they are thereby become *functi*; and when nothing more than the determination of a court of law remains, whether the *jus questum* to the office has accrued to the one person or to the other, it does not occur where is the necessity, or even the propriety, of bringing the electing

electing commissioners, as parties, into the field, unless where some thing particular in their conduct suggests the expediency of that measure; such as the irregular proceedings held by the few commissioners upon the 1st of June, which the petitioner was advised did fully justify him for concluding against them personally, for his expenses in this process.

Questions, as your Lordships well know, daily occur, relative to the validity of the proceedings of the commissioners of supply, such as the division of valuations, &c. In all these questions, there is no doubt, that the levying of the cess is indirectly concerned; and, accordingly, upon such occasions, where dilators were found useful to a defender, it has been pled, that the commissioners of supply ought to be made parties; but, so far as known to the petitioner, such objections have never been regarded by your Lordships.

Indeed, the defenders themselves do not argue consistently upon this point; for, your Lordships will have observed, that, in the debate before the Lord ordinary, they, at one time, insist that they should be made parties, and, with the same breath, insist, that they are improperly concluded against as to expences, because they fail to be considered as *judges*; but, it is not common to make judges parties in the review of their judgments.

The petitioner has further to observe, That, although the foundation of the Lord ordinary's interlocutor could be supported, still the conclusion drawn from it goes much too far, when it totally dismisses the process; for, the only ground for insisting, that the commissioners ought at all to be made parties, is the conclusion of the libel, which insists, that Mr. Kenneth Mackenzie should be dispossessed, and the petitioner put in the exercise of the office of collector; but, in so far, as there is a private dispute betwixt the parties, who was duly elected, so as to be intitled to the emoluments of the office, none of the commissioners can have any interest; and, therefore, *quoad hunc effectum*, it does not occur, why the action should not be allowed to proceed. But, it is hoped, your Lordships will have no occasion to enter into any such distinction, as you will be of opinion, that the parties called are sufficient, and proper contradictors to all the conclusions of the petitioner's libel.

The defenders insisted before the Lord ordinary upon some other topicks, totally foreign to the issue, such as, that the petitioner had no chance for a new election, having only prevailed at a private meeting of a few commissioners, and that he could not again prevail, and that the action had no other tendency, but to disturb that peace, which had for many years prevailed in the county.

All these topicks are highly improper. Your Lordships will judge, whether the proceedings of the one party, or of the other, are most calculated to create heat and animosity in the county. It is absurd to talk of a private meeting of a few commissioners electing the petitioner, when it was at the parliamentary meeting of the 30th of April, when there was no less than 37 present, and voted, besides others, who came likewise to vote for the petitioner, if they had not been deprived of the opportunity of doing so, by the clerk not using the new act of nomination: and, as to the petitioner's acting an ungracious part, it is astonishing, the defenders should have used that language, when they know, that his only motive for undertaking the office, was, to have an opportunity of communicating the emoluments of it to a numerous family of young orphans, who, by the recent calamity of losing their father, a gentleman of respectable family, were in circumstances standing in need of such an aid.

MAY it therefore please your Lordships, to alter the Lord ordinary's interlocutor, and to find, that the process may proceed, as to its whole conclusions, without calling the whole, or any part of the commissioners of supply, who voted upon the 30th of April; or, at least, to find, that it may proceed so far, as to determine the interest of the petitioner, and Mr. Kenneth Mackenzie, as to their right in the emoluments of the office, or to give such other relief in the premisses, as to your Lordships shall seem meet.

According to Justice, &c.

HENRY DUNDAS.